



**[6450-01-P]**

**DEPARTMENT OF ENERGY**

**Office of Energy Efficiency and Renewable Energy**

**[Case No. VHE-002]**

**Notice of Petition for Waiver and Grant of Interim Waiver of Empire Comfort Systems from the DOE Vented Home Heating Equipment Test Procedure**

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of Petition for Waiver, Granting of Application for Interim Waiver, and Request for Public Comments.

**SUMMARY:** This notice announces receipt of and publishes the Empire Comfort Systems Inc. (Empire) petition for waiver from the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of vented home heating equipment. The waiver request pertains to Empire's specified models of condensing-type vented heaters. The existing test procedure does not apply to condensing heaters. Empire asks that it be permitted to use the DOE test procedure proposed in the Notice of Proposed Rulemaking (NPR) for Direct Heating Equipment and Pool Heaters published in the Federal Register on October 24, 2013 (78 FR 63410), as an alternate test procedure to account for the energy consumption of its condensing-type direct heating equipment (DHE) models. DOE notes that only one of the basic model numbers submitted in the petition is a covered product subject to the test methods for vented

home heating equipment. Today's notice also grants Empire an interim waiver from the DOE test procedure applicable to direct heating equipment for the one basic model number properly included in the petition, subject to use of the alternative test procedure set forth in this notice. DOE solicits comments, data, and information concerning Empire's petition and the suggested alternate test procedure.

**DATES:** DOE will accept comments, data, and information with respect to the Empire Petition until, but no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by case number VHE-002, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: [AS\\_Waiver\\_Requests@ee.doe.gov](mailto:AS_Waiver_Requests@ee.doe.gov). Include the case number [Case No. VHE-002] in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.
- Postal Mail: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, Petition for Waiver Case No. VHE-002, 1000 Independence Avenue, SW, Washington, DC 20585-0121. Telephone: (202) 586-2945. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

Hand Delivery/Courier: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, Suite 600, Washington, DC 20024. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Docket: The docket, which includes Federal Register notices, comments, and other supporting documents/materials, is available for review at [www.regulations.gov](http://www.regulations.gov). All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

For further information on how to submit a comment, or review other public comments and the docket, contact Ms. Brenda Edwards at (202) 586-2945 or by email:

[Brenda.Edwards@ee.doe.gov](mailto:Brenda.Edwards@ee.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Office, Mail Stop EE-5B, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Telephone: (202) 586-0371. E-mail:

[Bryan.Berringer@ee.doe.gov](mailto:Bryan.Berringer@ee.doe.gov).

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC-71, 1000 Independence Avenue, SW., Washington, DC 20585-0103. Telephone: (202) 586-9507. E-mail: [Eric.Stas@hq.doe.gov](mailto:Eric.Stas@hq.doe.gov).

For information on how to submit or review public comments, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Telephone: (202) 586-2945. Email: [Brenda.Edwards@ee.doe.gov](mailto:Brenda.Edwards@ee.doe.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background and Authority**

Title III, Part B<sup>1</sup> of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94-163 (42 U.S.C. 6291-6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the vented home heating equipment that is the focus of this notice.<sup>2</sup> Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure the energy efficiency, energy use, or estimated annual operating costs of a covered product, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for vented home heating equipment is contained in 10 CFR part

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<sup>1</sup> For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

<sup>2</sup> All references to EPCA in this document refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Public Law 112-210 (Dec. 18, 2012).

430, subpart B, appendix O, Uniform Test Method for Measuring the Energy Consumption of Vented Home Heating Equipment.

The regulations set forth at 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered products. The Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) will grant a waiver if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(l). Petitioners should include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. Id. Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or if the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(a)(2) and (g). An interim waiver remains in effect for a period of 180

days or until DOE issues its determination on the petition for waiver, whichever is sooner, and may be extended for an additional 180 days, if necessary. 10 CFR 430.27(h).

## **II. Petition for Waiver of Test Procedure and Application for Interim Waiver**

On January 20, 2014, Empire filed a petition for waiver for condensing-type direct heating equipment models from the test procedure applicable to vented home heating equipment set forth in 10 CFR part 430, subpart B, appendix O.<sup>3</sup> In its petition, Empire seeks a waiver from the existing DOE test procedure for its vented gas heaters and fireplace systems under 10 CFR part 430 because Empire asserts that the existing test procedure does not account for condensing-type heating equipment. Empire seeks to use the test method proposed by DOE in a NOPR for Direct Heating Equipment and Pool Heaters published in the Federal Register on October 24, 2013 (78 FR 63410) (hereinafter the “October 2013 NOPR”), as an alternate test procedure to account for the energy consumption of its condensing-type DHE models. That notice, in relevant part, defines the term “condensing vented heater” and provides a method for testing these devices.

DOE notes that of the eight basic model numbers set forth in Empire’s petition, only one (PVS (18, 35)(K)(N)(P)) qualifies as a covered DHE product. The remaining seven basic models

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<sup>3</sup> On July 21, 2011, Empire originally filed a petition for waiver from the DOE test procedure for residential vented home heating equipment for specified condensing-type direct heating equipment models applicable to its Mantis vented gas fireplace systems. The DOE test procedure in appendix O has no provisions for testing condensing-type direct heating equipment. On November 3, 2011, DOE published the Empire petition for waiver (Case No. VHE-001) from the vented home heating equipment test procedure in the Federal Register (76 FR 68180). The notice provided for the submission of comments by December 5, 2011. Because all known manufacturers of domestically-marketed units of the same product type were not timely notified that DOE published the Petition for Waiver, DOE determined that re-opening of the public comment period was appropriate. On February 1, 2012, DOE published a notice of re-opening of public comment period in the Federal Register (77 FR 5001) with the comment period ending on March 2, 2012. DOE received no comments during the initial petition for waiver nor during the re-opening of public comment period. In the January 20, 2014 request, Empire stated that the list of models in the original waiver submitted to DOE on July 21, 2011 is no longer accurate and is superseded by its latter petition. Thus, DOE has withdrawn the petition under Case No. VHE-001.

(which are fireplaces, fireplace inserts, or stoves) are hearth products and are, therefore, subject to neither the test procedure requirements of 10 CFR part 430, subpart B, appendix O nor the proposed requirements of the October 2013 NOPR.<sup>4</sup> Therefore, only one of the basic models submitted in the petition was considered for waiver. For the remaining basic models, since testing of hearth products is not required under DOE regulations at this time, there is no need to consider a waiver for such models. However, if Empire chooses to conduct testing to make representations regarding the energy efficiency of these products, the company is free to use any test procedure it deems appropriate.

Empire also requests an interim waiver from the existing DOE test procedure for immediate relief. As noted above, an interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. See 10 CFR 430.27(g).

DOE has determined that Empire's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship Empire might experience absent a favorable determination on its application for interim waiver. DOE understands, however, that absent an

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<sup>4</sup> On February 8, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision vacating the DOE definition of "Vented hearth heater" at 10 CFR 430.2, and remanded the issue to DOE to interpret the challenged provisions consistent with the court's opinion. Hearth, Patio & Barbecue Association v. U.S. Department of Energy, 706 F.3d 499, 509 (D.C. Cir. 2013). Since that time, DOE has published a proposed coverage determination that would classify all hearth products as a new covered product pursuant to 42 U.S.C. 6292(a)(20) and (b). 78 FR 79638 (Dec. 31, 2013).

interim waiver, the basic model submitted by Empire that qualifies as a covered product could not be tested and rated for energy consumption on a basis representative of its true energy consumption characteristics. It is in the public interest to have similar products tested and rated for energy consumption on a comparable basis, where possible. Furthermore, DOE has determined that Empire is likely to succeed on the merits of its petition for waiver and that it is desirable for public policy reasons to grant immediate relief. Empire requests to use the test method proposed by DOE in the October 2013 NOPR as an alternate test procedure to account for the energy consumption of its condensing-type direct heating equipment models; that notice, in relevant part, defines the term “condensing vented heater” and provides a method for testing these devices, thereby providing a suitable vehicle for testing these products and making representations as to their energy efficiency.

### **III. Interim Waiver Granted**

For the reasons stated above, DOE grants Empire’s application for interim waiver from testing of its condensing vented gas heater system. DOE cannot grant Empire’s application for interim waiver of its vented hearth products, as these products do not meet the definition of direct heating equipment. Therefore, *it is ordered that*:

The application for interim waiver filed by Empire is hereby granted for Empire’s condensing vented gas heater system, subject to the following specifications and conditions below. Empire shall not be required to test its condensing vented gas heater system on the basis of the test procedure at 10 CFR part 430, subpart B, appendix O, but instead, it shall be required



to test and rate that system according to the alternate test procedure as set forth in section IV, “Alternate test procedure.” Testing is not required at this time for all other basic models listed in the petition that refer to hearth products (*i.e.*, those that are fireplaces, fireplace inserts, or stoves), although if Empire elects to test such models, it may use an appropriate test procedure of its choosing.

Specifically, the interim waiver applies to the following basic model (condensing vented heater):

PVS ( 18,35 ) (K)(N)(P)

The interim waiver does not apply to the following basic models (condensing fireplaces, fireplace inserts, and stoves):

FG28BM (K)(N)(P)

IG28BM (N)(P)

BF28 (B,C,G)M(K)(N)(P)

BP28 (B,C,G)M(K)(N)(P)

BI28 (B,C,G)M(K)(N)(P)

FF28BM (K)(N)(P)

FI28BM (N)(P)

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. Empire may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of vented gas heater systems for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that granting of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

Further, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may revoke or modify this interim waiver at any time upon a determination that the factual basis underlying the petition for waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

#### **IV. Alternate Test Procedure**

EPCA requires that manufacturers use DOE test procedures to make representations about the energy consumption and energy consumption costs of products covered by the statute. (42 U.S.C. 6293(c)) Consistent representations are important for manufacturers to use in making representations about the energy efficiency of their products and to demonstrate compliance with applicable DOE energy conservation standards, as well as for consumers who rely upon such representations in making purchasing decisions. Pursuant to its regulations applicable to waivers and interim waivers from applicable test procedures at 10 CFR 430.27, DOE will consider setting an alternate test procedure for Empire in a subsequent Decision and Order.

During the period of the interim waiver granted in this notice, Empire shall test the product listed above according to the test procedures for condensing vented heaters proposed by DOE in the NOPR test procedure rule published October 24, 2013 (78 FR 63410). At this time, testing is not required for hearth products (*e.g.*, fireplaces, fireplace inserts, or stoves), and these products are not covered by the test procedure at 10 CFR part 430, subpart B, appendix O, or the October 2013 NOPR. If Empire elects to test hearth product models, it may use an appropriate test procedure of its choosing.

## **V. Summary and Request for Comments**

Through today's notice, DOE announces receipt of Empire's petition for waiver from the DOE test procedure for vented home heating equipment and grants Empire an interim waiver from the test procedure for its PVS (18, 35)(K)(N)(P) condensing direct heater model. DOE publishes Empire's petition for waiver in its entirety. The petition does not contain confidential information. The petition includes a suggested alternate test procedure to determine the energy efficiency of Empire's specified condensing direct heaters. DOE has required use of this alternate test procedure as a condition of its grant of interim waiver and is considering including this alternate procedure in its subsequent Decision and Order.

DOE solicits comments from interested parties on all aspects of the petition, including the suggested alternate test procedure and calculation methodology. Any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is: Mr. Kenneth J. Belding, Vice President – Delivery Support Services, Empire Comfort Systems, Inc., 918 Freeburg Avenue, Belleville, Illinois 62220-2623. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies to DOE: one copy of the document marked “confidential” with all of the information believed to be confidential included, and one copy of the document marked “non-confidential” with all of the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on March 26, 2014.

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Kathleen B. Hogan,  
Deputy Assistant Secretary for Energy Efficiency,  
Energy Efficiency and Renewable Energy.

From: Ken Belding [mailto: ]

Sent: Monday, January 20, 2014 05:44 PM

To: Armstrong, Ashley

Cc: Cymbalsky, John

Subject: FW: RE: Test Procedures for Direct Heating Equipment (DHE) and Pool Heaters; RIN 1904-AC94 Docket # EERE-2013-BT-TP-0004

Dear Ms. Armstrong,

Thank you for your timely response to my earlier note, we appreciate it.

As you are aware, the prescribed test procedure for Empire Comfort Systems high efficiency models that produce condensate from the products of combustion evaluates the basic model in a manner as to be unrepresentative of it's true energy consumption characteristics so as to provide materially inaccurate comparative data. Because of this, it is our desire to use the revised test procedure for condensing Direct Heating Equipment (DHE) as soon as possible.

The list of models in the original waiver we submitted to the DOE is no longer accurate. The revised, accurate list is below.

This is our official request for the DOE to issue us a waiver/interim waiver as soon as possible.

We also understand that we potentially will need to retest for efficiency certification when the final testing methodology is released by the DOE.

Ashley, is it possible for you to let us know how quickly the waiver/interim waiver could be granted? We have been at this for more than 2 years and are obviously anxious to get the real efficiency numbers for our product to the market. As always we appreciate your effort on our behalf.

Model numbers needing a waiver:

PVS ( 18,35 ) (K)(N)(P)  
FG28BM (K)(N)(P)  
IG28BM (N)(P)  
BF28 (B,C,G)M(K)(N)(P)  
BP28 (B,C,G)M(K)(N)(P)  
BI28 (B,C,G)M(K)(N)(P)  
FF28BM (K)(N)(P)  
FI28BM (N)(P)

Thank you ,

Ken Belding  
VP Delivery Support Services

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